INDEX

	Page
Interest of the United States	1
Statement	2
Discussion	5
Conclusion	12

CITATIONS

Cases:

Allen-Bradley Local v. *Wisconsin Employment Relations Board*, 315 U.S. 740	10
Automobile Workers v. *Russell*, 356 U.S. 634	10
Benz v. *Compania Naviera Hidalgo*, 353 U.S. 138	4
Brotherhood of Railroad Trainmen v. *Jacksonville Terminal Co.*, 394 U.S. 369	7
Grain Elevator Workers, Local 418 v. *National Labor Relations Board*, 376 F. 2d 774, certiorari denied, 389 U.S. 932	8
Hanna Mining Company v. *Marine Engineers Benevolent Ass'n.*, 382 U.S. 181	11
Incres Steamship Company v. *Maritime Workers*, 372 U.S. 24	4
International Association of Machinists v. *Gonzales*, 356 U.S. 617	10
International Longshoremen's, Local 1416 v. *Ariadne Shipping Co.*, 397 U.S. 195	11
Linn v. *Plant Guard Workers*, 383 U.S. 53	10
McCulloch v. *Sociedad Nacional*, 372 U.S. 10	4
Moore Drydock, 92 NLRB 547	8
National Woodwork Manufacturers v. *National Labor Relations Board*, 386 U.S. 612	7
Retail Clerks v. *Schermerhorn*, 375 U.S. 96	9

559-320—74——1

Cases—Continued

	Page
San Diego Building Trades Council v. *Garmon*, 359 U.S. 236	8, 11
Smith v. *Evening News Assn.*, 371 U.S. 195	10
Vaca v. *Sipes*, 386 U.S. 171	10
Windward Shipping (London) Ltd., et al. v. *American Radio Association, AFL–CIO, et al.*, 415 U.S. 104	1, 2, 5, 9, 11, 12

Statutes:

Labor Management Relations Act of 1947, 61 Stat. 136, as amended, 29 U.S.C., 141, *et seq*	5
Section 301, 29 U.S.C. 185	9
Section 303, 29 U.S.C. 187	9
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):	
Section 8(b)(4)(B), 29 U.S.C. 158(b)(4)(B)	6, 7, 8, 9, 11
Section 14(c), 29 U.S.C. 164(c)	10

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, ET AL.,
PETITIONERS

v.

MOBILE STEAMSHIP ASSOCIATION, INC., AND ROBERT E. MALONE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This memorandum addresses the threshold issue of preemption in the case. We submit it because of the importance of that question to the government, including the National Labor Relations Board and the Department of State, which subscribe to the views expressed here.

As in *Windward Shipping (London) Ltd., et al.* v. *American Radio Association, AFL-CIO, et al.*, 415 U.S. 104, the decision in the present case could have

important consequences or United States trade and could create serious probms in United States foreign relations. Picketing that prevents the loading or unloading of foreign-flag ips in United States ports could be severely disrtive of the United States economy, since foreign-g ships carry close to 95 percent by tonnage (an81 percent by value) of all United States waterborn trade, including 95 percent of waterborne deliveries f petroleum products.

STEMENT

Except in one importt respect—the character of the complaining party—is case is identical to *Windward Shipping, supra.*

The vessel *Aqua Glor* is a ship of Liberian registry which carries cargbetween United States and foreign ports. The crewnd officers of the vessel are foreign nationals (Pet.App. 8a). On November 3, 1971, while the *Aqua Gl* was docked at the Port of Mobile, Alabama, for thpurpose of loading and unloading cargo, six Ameran maritime unions, acting in concert, established picket line in front of the vessel. Four pickets caied signs which read (Pet. App. 6a):

> ATTENTION TO TE PUBLIC: THE WAGES AND BENEFITS PAID ABARD THE VESSEL SS AQUA GLORY * * * ARE SBSTANDARD TO THOSE OF AMERICAN SEAMENHIS RESULTS IN EXTREME DAMAGE TO OUR AGE STANDARD AND THE LOSS OF OUR JOBS.

PLEASE DO NOT PATRONIZE THESE VESSELS. HELP THE AMERICAN SEAMEN. WE HAVE NO DISPUTE WITH ANY OTHER VESSELS AT THIS SITE.

[Printed names of the six unions]

The pickets did not speak to anyone. Instead, they handed out literature which read (Pet. App. 7a):

TO THE PUBLIC:

American Seamen have lost approximately 50% of their jobs in the past few years to foreign flag ships employing seamen at a fraction of the wages of American Seamen.

American dollars flowing to these foreign ship owners operating ships at wages and benefits substandard to American Seamen, are hurting our balance of payments in addition to hurting our economy by the loss of jobs.

A strong American Merchant Marine is essential to our national defense. The fewer American flag ships there are, the weaker our position will be in a period of national emergency.

PLEASE PATRONIZE AMERICAN FLAG VESSELS. SAVE OUR JOBS. HELP OUR ECONOMY AND SUPPORT OUR NATIONAL DEFENSE BY HELPING TO CREATE A STRONG AMERICAN MERCHANT MARINE.

Our dispute here is limited to the vessel picket at this site, the SS * * *.

The names of the unions again appeared at the bottom of the leaflets.

No labor dispute existed between the owners of the *Aqua Glory* and their crew or the foreign unions

representing the crew while the picketing took place. The picketing was peaceful (Pet. App. 8a).

As a result of the picketing, longshoremen and other workers refused to service the vessel (Pet. App. 9a). This triggered the present suit, initiated by the Mobile Steamship Association, a non-profit corporation whose members include stevedoring companies and agents representing steamship companies. The Association asked an Alabama state court to enjoin the picketing on the grounds that the unions had unlawfully interfered with the contractual relationship between Association members and the companies operating the picketed vessels, and with the Association members' right to carry on their lawful business (Pet. App. 37a–39a). Shortly thereafter, respondent Malone intervened. He grows soybeans which are delivered to grain elevators at the docks and then loaded aboard vessels for export, and he claimed that the unions' activity similarly interfered with his right to carry on his lawful business (Pet. App. 6a).

The Alabama Circuit Court preliminarily enjoined the picketing (Pet. App. 28a–30a). The Alabama Supreme Court affirmed, 291 Ala. 201, 279, So. 2d 467, relying upon *Benz* v. *Compania Naviera Hidalgo,* 353 U.S. 138; *McCulloch* v. *Sociedad Nacional,* 372 U.S. 10; and *Incres Steamship Company* v. *Maritime Workers,* 372 U.S. 24. The appellate court stated that "[t]he dispute was either one between the unions and the foreign shipowners to force a raise in the internal standards of these vessels, or one where the intent was to block use of those ships to force Congress to act in the international sphere, which in either case

are matters affecting international relations and not properly for NLRB jurisdiction" (Pet. App. 14a). Accordingly, the conclusion was reached that the Alabama courts were not preempted from entertaining the suit by the Labor Management Relations Act of 1947, 29 U.S.C. 141, *et seq.*

DISCUSSION

The obvious first question in the case is: Does *Windward Shipping* resolve the issue whether the state courts properly entertained jurisdiction of this suit? We submit that it does, subject to one qualification.

1. Both cases involve picketing of a foreign vessel by American unions, calling attention to the adverse consequence for domestic seamen of the lower wages paid foreign seamen, and asking all those in a position to do so to boycott the foreign vessel. In form, in purpose, and in effect, the picketing in this case was identical to that in *Windward Shipping*. Indeed, the same unions were involved and identical signs and literature were used. In both cases, the unions expressly disclaimed any dispute with the foreign vessel and eschewed any violence. Yet, here, as in *Windward Shipping*, the picketing effectively dissuaded longshoremen and other neutral employees from loading or unloading the ship.

On these facts, this Court in *Windward Shipping* reasoned:

> [T]he pickets must have hoped to exert sufficient pressure so that foreign vessels would

> be forced to raise their operating costs to levels comparable to those of American shippers, either because of lost cargo resulting from the longshoremen's refusal to load or unload the vessels, or because of wage increases awarded as a virtual self-imposed tariff to regain entry to American ports. [415 U.S. at 114.]

Thus, if the picketing were successful, the consequential increase in operating costs for foreign vessels "would have more than a negligible impact on [their] 'maritime operations' "—an impact which "would be by no means limited to costs incurred while in American ports." (*Ibid.*) The Court concluded, therefore, that since the impact of the picketing was not "limited to the sort of wage-cost decision benefitting American workingmen which the LMRA was designed to regulate" (*ibid.*), the activity was not subject to regulation by the Labor Board and the state courts were free to intervene.

The same considerations would seem to be dispositive here. To be sure, in our case, those who sought the injunction were neutral American employers, not foreign shipowners as in *Windward Shipping*. But it is not apparent how the character of the state court plaintiff can bring within the ambit of the Labor Relations Act activity which has been held outside it. Accordingly, the proper conclusion would seem to be that, here too, the state courts have exclusive jurisdiction to enjoin the picketing.

2. There is, however, a difficulty in concluding the matter so swiftly. Section 8(b)(4)(B) of the National

Labor Relations Act[1] was enacted to shield innocent third persons from the adverse impact of labor disputes to which they were not privy,[2] and it is difficult to appreciate why the respondents here—American employers and suppliers—should not be free to invoke the Board's aid under that provision.

Thus, here, when longshoremen refused to cross the picket lines to load and unload the foreign vessels, their employers might have wished to seek relief from

---

[1] The relevant portion of the provision, codified as 29 U.S.C. 158(b)(4)(B), is as follows:

"It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in any industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing * * *."

[2] See *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 386–390; *National Woodwork Manufacturers* v. *National Labor Relations Board*, 386 U.S. 612, 624.

the Board. Since the picketing, to the extent that it had secondary effects, "arguably" amounted to a secondary boycott prohibited by Section 8(b)(4)(B),[3] the Board would plainly have jurisdiction to entertain the complaint if the primary dispute did not involve a foreign vessel. It is not apparent why the nationality of the primary employer should make any difference. The secondary pressures brought to bear upon the neutral parties are the same, regardless of the target's nationality. Moreover, since foreign-flag ships carry more than 90 percent of all United States waterborne foreign trade, the secondary aspects of a primary dispute with foreign-flag ships could be widespread, affecting any agricultural producer or manufacturer who depends upon foreign-flag vessels for carrying his goods. If the Labor Board were to lack jurisdiction over these secondary effects, neutral parties far removed from the primary dispute would thereby lose the protection of Section 8(b)(4)(B) of the Act.

On the other hand, the normal rule, where activity is "arguably" prohibited by the National Labor Relations Act, is that state courts are preempted. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245. Thus, holding that the Labor Board has exclusive jurisdiction of secondary activity involving American antagonists regardless of the nationality of the primary employer would bring us back to the anomaly that the state courts may or may not enjoin picketing

[3] See *Moore Drydock*, 92 NLRB 547, 549; *Grain Elevator Workers, Local 418* v. *National Labor Relations Board*, 376 F. 2d 774 (C.A.D.C.), certiorari denied, 389 U.S. 932.

depending on the identity of the plaintiff. That result, as we have noted, seems untenable. Accordingly, we suggest a solution that accommodates both concerns.

3. A way to reconcile the competing claims of Section 8(b)(4)(B) and *Windward Shipping* is to recognize that state courts and the Labor Board have concurrent jurisdiction over the secondary aspects of primary disputes with foreign shipowners. Under this arrangement, Section 8(b)(4)(B) protection would be available to neutral parties regardless of the nationality of the primary target, and the jurisdiction of state courts could be invoked regardless of the identity of the plaintiff.

When the primary dispute is not in "commerce" within the meaning of the Act, the Labor Board need not have exclusive jurisdiction over secondary aspects "arguably" subject to Section 8(b)(4)(B). "*Garmon* * * * does not state a constitutional principle; it merely rationalizes the problems of coexistence between federal and state regulatory schemes in the field of labor relations * * *." *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 103. The preemption doctrine has never been rigidly applied when it could not be fairly inferred that Congress intended exclusive jurisdiction to lie with the Labor Board. Congress[4]

[4] See, *e.g.*, Section 303 of the Labor Management Relations Act of 1947, 29 U.S.C. 187, which expressly permits anyone injured by a violation of Section 8(b)(4) of the National Labor Relations Act to recover damages in a federal court even though such unfair labor practices are also remediable by the Board; Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, which permits suits for breach of a collective bargaining agreement regardless of whether the particular breach is also an

and this Court[5] have carved out exceptions to the Board's exclusive jurisdiction. These exceptions "demonstrate that the decision to preempt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies." *Vaca* v. *Sipes*, 386 U.S. 171, 180.

Here the application of state law would not operate to frustrate the purpose of the federal jurisdiction. A primary justification for the preemption doctrine—"the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose * * *," *Vaca* v. *Sipes*, *supra*, 386 U.S. at 180–181—is not applicable to cases where the primary dispute is outside the jurisdiction of the Board. "[E]ven if a § 8(b)(4)(B) violation were present, central

---

unfair labor practice within the jurisdiction of the Board (see *Smith* v. *Evening News Assn.*, 371 U.S. 195); and Section 14(c) of the National Labor Relations Act, as amended by Title VII, Section 701(a) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. 164(c), which permits state agencies and courts to assume jurisdiction "over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction."

[5] See, *e.g.*, *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (libel); *Automobile Workers* v. *Russell*, 356 U.S. 634 (violence); *International Association of Machinists* v. *Gonzales*, 356 U.S. 617 (wrongful expulsion from union membership); *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U.S. 740 (mass picketing); *Vaca* v. *Sipes*, 386 U.S. 171 (duty of fair representation).

interests served by the *Garmon* doctrine are not endangered by a state injunction when * * * the workers sought to be organized are outside the regime of the Act." *Hanna Mining Company* v. *Marine Engineers Benevolent Ass'n.*, 382 U.S. 181, 192–193. Since the Labor Board has no jurisdiction over the primary dispute, the Board's only concern is to provide neutral parties with the protection of Section 8(b)(4)(B). The Board need not have exclusive jurisdiction in order to do so. Neutral parties should therefore be free to take advantage of Section 8(b)(4)(B), or to seek injunctive relief in state court.

By the same token, so long as the secondary dispute implicates American employers and American employees, the Labor Board's exercise of concurrent jurisdiction would not undermine *Windward, supra.* Since the Board need only decide whether the secondary effects are prohibited by Section 8(b)(4)(B), concurrent jurisdiction would not "thrust the National Labor Relations Board into 'a delicate field of international relations.'" *International Longshoremen's, Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195, 199. Moreover, the consequences of a Board decision that the secondary pressure violated Section 8(b)(4)(B) would not encroach upon any of the shipowners' prerogatives about which this Court was concerned in *Windward*. A Board decision that the secondary pressure did not violate Section 8(b)(4)(B) likewise would have no effect upon foreign shipowners, since the neutral employers or the shipowners would always be free to seek an injunction in state court.

The Department of State is concerned about the impact of a reversal here upon our relations with other countries. As evidenced by the *amicus* brief for the Government of Liberia, foreign governments are concerned that this Court's decision in *Windward, supra,* might be undermined in the present case. The National Labor Relations Board, on the other hand, is concerned that *Windward* might be extended in the present case to include an area traditionally within the jurisdiction of the Labor Board. We suggest that by providing the Labor Board and state courts with concurrent jurisdiction over the secondary aspects of primary disputes with foreign shipowners, both concerns may be vindicated.

CONCLUSION

For these reasons, the court below correctly concluded that it was not preempted by the jurisdiction of the Labor Board from entertaining an injunction to end the picketing in this case.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
ROBERT B. REICH,
Assistant to the Solicitor General.

SEPTEMBER 1974.

U. S. GOVERNMENT PRINTING OFFICE: 1974